

State of Delaware

Public Integrity Commission



ETHICS
TRANSPARENCY IN GOVERNMENT

ANNUAL REPORT
2016

William F. Tobin, Jr., Chair
Bonnie Smith and Michele Whetzel, Vice Chairs

Commissioners

*Dr. Wilma Mishoe * Lisa Lessner*
*Jeremy Anderson, Esq. * Andrew Gonser, Esq.*

STATE PUBLIC INTEGRITY COMMISSION

Annual Report - 2016

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I. Mission:

Administer, interpret and enforce the Code of Conduct (ethics); Financial Disclosure; Dual Compensation; and Lobbying Laws.

Jurisdictional History

- ✓ **1991 – State Ethics:** Executive Branch officers and employees, including casual/seasonal; (over 52,000); non-legislative elected officials; State Board and Commission appointees (In 2015, over 300 Boards and Commissions).
- ✓ **1993 – Local Ethics:** 57 local governments' employees, officers, elected officials, and Board and Commission appointees, unless they submit a Code for the Commission's approval. (As of 2015, only 8 have an approved Code, leaving PIC with 49 local jurisdictions).
- ✓ **1994 – Dual Compensation:** State and local employees and officials with a second elected or paid appointed job in government.
- ✓ **1995 – Financial Disclosure:** elected officials; State candidates; Judges, Cabinet Secretaries, Division Directors and equivalents. (2015: 329 officers filed).
- ✓ **1996 – Lobbying:** State lobbyists registration, authorization and expense reports (2015: 343 lobbyists; 1015 organizations; over 3000 expense reports).
- ✓ **2000 – Ethics:** School Districts and Boards of Education
- ✓ **2001 – Ethics:** Charter School Boards of Education
- ✓ **2010 – Organizational Disclosures:** State elected officials & candidates must disclose private organizations if they are Board or Council members.
- ✓ **2010 – Newark Housing Authority:** Newark's Code of Conduct included the Authority, but the General Assembly changed the law to make it a State agency so that PIC would have jurisdiction.
- ✓ **2012 – Lobbyists:** Report within 5 business days legislative bill number or administrative action number or title on which they are lobbying. Report weekly on lobbyists' legislative/administrative action.
- ✓ **2014 – Lobbyists:** Successfully proposed legislation to charge lobbyists a fee for failure to file their expense reports in a timely manner.



PUBLIC INTEGRITY COMMISSION

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Commission Structure

Appointments, Qualifications and Compensation

- 7 Citizens are the “public eye” on Government Ethics
- Nominated by the Governor; confirmed by the Senate
- Elect their own Chair
- Cannot be:
 - ✓ Elected or appointed official – State, Federal or Local
 - ✓ Holder of political party office
 - ✓ An officer in a political campaign
- Generally appointed from all three counties
- Terms – one full 7 year term; may serve until successor is appointed and confirmed
- Vacancies filled just as original appointments
- Pay - \$100 each official duty day; reimbursement of reasonable and necessary expenses

II. Commission Structure and Biographies of Commissioners and Staff

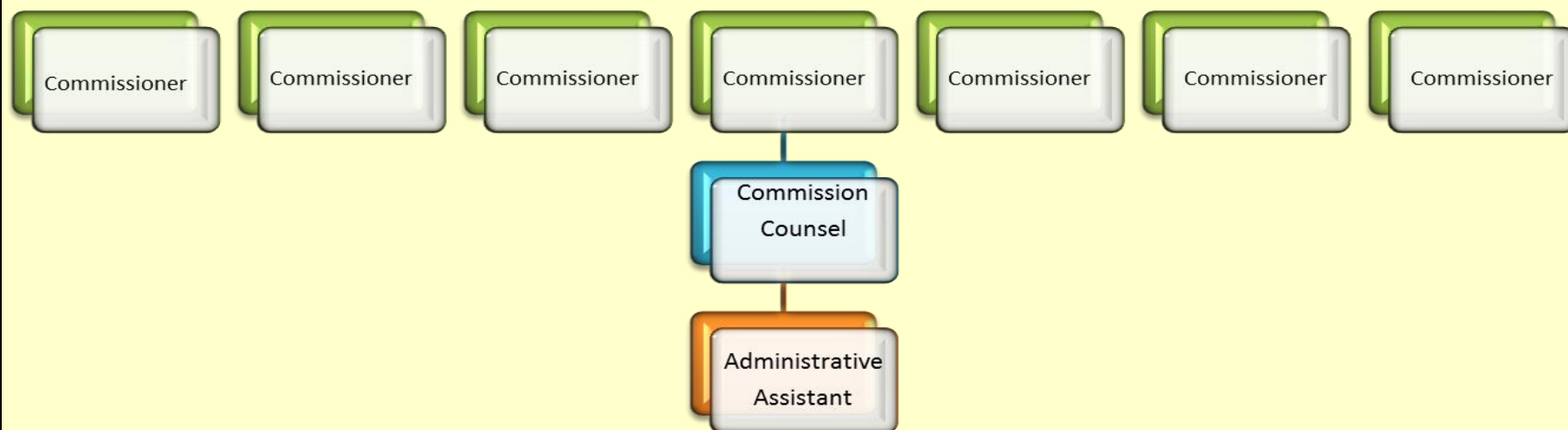
A. Commission Appointee Status

The Commission said goodbye to Commission member Mark Dunkle, Esq. and welcomed Michele Whetzel in 2016. All three counties of the State are represented with four members of the Commission from New Castle County, one from Kent County and two from Sussex County.

B. Commission Staff

The Commission has had a two person full-time staff since 1995—its attorney and administrative specialist—performing day-to-day operations. Its attorney, beyond legal duties, conducts training, prepares Strategic Plans, Budgets, and performs other non-legal duties. The Commission's Administrative Assistant performs the administrative functions, updates the website's calendar of events with the Commission agenda, minutes, etc.

C. Organizational Chart



D. Biographies of Commissioners



***William F. Tobin, Jr.
Chair***

William F. Tobin was appointed to complete a few months of the remaining term of former Chair, Barbara Green. Mr. Tobin was reappointed by the Governor in 2013 to serve his own 7-year term which expires in May 2020. He was elected Vice Chair, Policies & Procedures in 2012 and served in that role until he was elected Chair in September 2014. Mr. Tobin was re-elected Chair in November 2015.

Mr. Tobin has served many years in private sector positions, both for-profit and non-profit. His work has included managing budgets of more than \$500,000, and other fiscal aspects such as inventory control, asset management and audit reviews. He is presently a credit manager and safety director for

George Sherman Corporation, Lewes, Delaware. He also has an extensive background in sales, and trained and mentored new and existing sales staff.

His public sector experience ranges from 7 years of active duty in the U.S. Coast Guard, where he developed extensive emergency management skills, to training fire company members on Small Boat Handling in conjunction with the Delaware State Marine Police.

He has long been an active member and officer of organizations in the fire and rescue areas, serving as Treasurer and Co-Chair of the Fire and Rescue Boat Committee, Memorial Fire Company; Sussex County Technical Rescue Team as the Finance and Budget Executive, and member of the Delaware State Fire Police and Indian River Fire Company; and Executive Administrator, assistant treasurer, finance Board member of Georgetown American Legion Post #8, Ambulance State #93.

Aside from his interest in fire and safety, he is active in his community as Treasurer, Lower Delaware Shield and Square; American Legion Post #5 member; St. John's Masonic Lodge member; DE Consistory member, and Nur Temple member.

Commissioner Tobin resides in Harbeson, Sussex County, Delaware.



Bonnie O'Day Smith
Vice-Chair, Personnel

Ms. Smith was appointed to the Public Integrity Commission on March 26, 2014. Her term expires on March 26, 2021. Ms. Smith was elected Vice-Chair of Personnel in November 2015.

Ms. Smith retired from Sussex County government in November 2013, after 44 years of dedicated service. During her employment, Ms. Smith worked her way up the career ladder from an entry level position to become the Director of Data Processing. Ms. Smith developed the computer software used by all County employees.

Ms. Smith received her Associates Degree from Delaware Technical & Community College in Georgetown and was a member of the school's first graduating class. During the course of her career, she also received several training certificates from IBM.

Ms. Smith has previously served on the Delaware Technical and Community College Advisory Computer Information Systems Board. She has been involved in community activities such as the Lions

Club and the Bridgeville Volunteer Fire Company. She attended Chaplain Chapel and is now attending Union United Methodist Church of Bridgeville. Ms. Smith has become a Fund for Women Founder, a Delaware organization that raises funds for various charities throughout the State.

She currently resides with her husband Thomas and their dog Greedy in Bridgeville, Delaware.



Michele Whetzel
Vice-Chair, Admin & Procedures

Mrs. Whetzel was confirmed as a Commissioner on June 15, 2016 for a seven-year term expiring in 2023.

Mrs. Whetzel has lived in Delaware since 1976. She graduated from Newark High School and earned a degree in Finance and Economics from the University of Delaware. After college she worked in financial services and was a Trust Officer with American Guaranty & Trust Company. In 1993 Mrs. Whetzel chose to stay at home with her two (now adult) children. She became active in their

schools, the neighborhood, and the greater community through charitable and volunteer activities. Mrs. Whetzel is currently the Executive Vice President and Chief Financial Officer for her family's property management business, Thinking Eye Dog, LLC.

For over 25 years Mrs. Whetzel has been an active volunteer in the nonprofit sector, serving on the Ministry of Caring Guild Board (treasurer), the New Castle County Adopt-a-Family Board, and the Delaware Community Foundation Board. She recently completed a two-year term as Chair of the Fund for Women and has held other offices on the organization's board since 2008. During her term as Chair the Fund increased its membership by 28% from 1,297 members to 1,660, the largest increase since the organization was founded in 1993.

In addition to the board activities, Mrs. Whetzel also volunteers for Kind to Kids and Child, Inc., serves as an advisor for the Delaware Community Foundation's New Castle County Youth Philanthropy Board, and is on the steering committee for ERANow. She also represents the Fund for Women on the Delaware Grantmakers Association and is starting her 10th year as a mentor through Creative Mentoring at Shue-Medill Middle School.

Mrs. Whetzel and her husband Robert reside in Newark.



Lisa Lessner

Mrs. Lisa Lessner was confirmed as a Commissioner on June 16, 2010 for a seven year term, expiring in 2017.

Mrs. Lessner is currently working as a fund raising consultant for Innovative Schools, a charter school management organization based in Wilmington.

For the past 17 years, Mrs. Lessner has actively worked as a community volunteer for various non-profits. She is currently a board member of the Boys and Girls Club of Delaware, Albert Einstein Academy, and Leading Youth Through Empowerment (LYTE), and also volunteers as a mentor for Creative Mentoring and in various capacities at Wilmington Friends School. Mrs. Lessner was a founder and board member of the Delaware Children's Museum for 14 years. Volunteering more than 1,000 hours a year, she chaired its Marketing and Exhibits Committees. In 1997, she was elected Vice President, until elected President in 2004. She served in that role until February 2010.

Mrs. Lessner's efforts for Delaware's first children's museum included extensive market research, writing an extensive business plan, attending conferences and networking with professionals in other States from children's museums, securing start-up funds, hosting fund raising events, hiring professional exhibit designers and architects, creating an exhibit master plan, hiring an executive director, and securing \$5 million in funds from the Riverfront Development Corporation for the museum's land and building. Her efforts were rewarded when the Museum opened in April 2010—on time and on budget.

While undertaking those efforts, she also was a Board member of Albert Einstein Academy (2001-2007), and a Delaware Theatre Company Board member (2009-2010).

Mrs. Lessner's business acumen began with a University of Delaware Bachelor of Science Degree in Accounting. That was followed by an MBA in Health Care Administration from Widener University, Chester, Pennsylvania. After interning for IBM and Morgan Bank, she worked for the Hospital of the University of Pennsylvania in a variety of positions, including Budget Specialist, Budget Manager, Senior Associate for Clinical Effectiveness and Senior Associate to the Executive Director. Later, she used her skills as an independent consultant for the Clinical Care Associates, University of Pennsylvania Health System. Her consultant work encompassed being the temporary Chief Financial Officer, and working on special projects, including establishing financial and human resources policies and procedures.

Mrs. Lessner and her family reside in Wilmington, DE.



Wilma Mishoe, Ed.D.

Dr. Mishoe was confirmed as a 7-year appointee to the Public Integrity Commission on March 15, 2011. Her term will expire in 2018. She was elected as the Vice Chair for Policies & Procedures during the first full year of her term, and in Oct. 2012 she was elected Commission Chair. Dr. Mishoe served as Commission Chair until September 2014.

Dr. Mishoe earned her doctorate at Temple University where her dissertation was on the preferred learning styles of learning disabled adults at post-secondary institutions. She earned both her Masters and Bachelor Degrees from Howard University, Washington, D.C.

Dr. Mishoe was employed at Delaware Technical & Community College for 30 years, and retired at the end of 2010 after having served as Dean of Student Services followed by Dean in the Office of Instruction. She also had been Dean of Students and Director of Financial Aid at Wilmington College (now University) from 1975-1980. Before that employment, she worked for The Brookings Institution in Washington, D.C.

She remains active in educational and community activities. Most recently, she served as Acting President of Wilberforce University in Ohio, where she had previously served as a member and Secretary of the Board of Trustees, chairing the Academic, Student Affairs and Compliance Committee. She is presently a member of the Board of Trustees at Delaware State University. She is also a member of Children and Family First, and Supporting Kidds Boards of Directors; VSA Delaware – The State Organization on Arts and Disability; and is on the Board of Stewards Pro Tem for Mts. Zion A.M.E. Church, Dover.

Dr. Mishoe has held memberships and positions as Treasurer of the Dover Rotary Club; Vice President and President, Dover Alumnae Chapter, Delta Sigma Theta Sorority, Inc., a public service organization of college-educated women, founded in 1913; Vice President and Treasurer of the Dover, (DE) Chapter of The Links, Incorporated. Founded in 1946, it is one of the oldest and largest volunteer service organizations of women who are committed to enriching, sustaining and ensuring the culture and economic survival of African Americans and other persons of African ancestry. Dr. Mishoe has received numerous honors and awards for her community leadership and work in education. Most recently, the Delmarva Black Chamber of Commerce awarded her its Leadership and Service Award in Education. In past years, she received the Citizen of the Year Award from Psi Iota Chapter, Omega Psi Phi Fraternity, Inc.; Employee of the Year Award from DelTech (Terry Campus); and Super Stars in Education Finalist from the Central Delaware Chamber of Commerce. She was a Certified Mediator by the Center for Community

Justice, and received the First Line Leadership Certification from the State of Delaware.

She co-chaired the Mid-Eastern Association of Education Opportunity Program Personnel Student Leadership Conference; and through the National Council of Education Opportunity Association's Legislative Policy Seminar, she gave a presentation to Delaware's congressional assistants on the Title IV student services programs designed to identify and provide services for individuals from disadvantaged backgrounds.

Dr. Mishoe resides in Dover, Delaware, and in March 2013 was selected to be inducted into the Delaware Commission for Women's Hall of Fame of Delaware Women.



Andrew W. Gonser, Esq.

Mr. Gonser was confirmed to serve a seven-year term on the Commission in June 2011, with his term ending in June 2018. In 2012, he was elected to serve as Vice Chair, Personnel and re-elected in 2013 and 2014. Mr. Gonser relinquished his position as Vice-Chair in

2015, per PIC Rules limiting the maximum term of office to three years.

Mr. Gonser is a partner in the law firm of Gonser and Gonser in Wilmington. He is experienced in all aspects of Family Court matters from divorce, property division, custody and visitation, to paternity issues, guardianships and adoptions. He currently serves as Chair of the Family Law Section of the Bar Association and has won numerous awards including being Voted Top Family Law Attorney in Delaware Today multiple times.

After graduating *cum laude* from Widener University of School of Law in 2004, he clerked for the Honorable Jan R. Jurden, Delaware Superior Court. He is admitted to practice in all Delaware Courts, the U.S. District Court (Delaware), and the U.S. Supreme Court.

His undergraduate degree is in English from the University of Delaware, where he received the Division I Men's Soccer Letterman's Award.

Mr. Gonser is actively engaged in legal and non-legal activities. He is a volunteer attorney for the Legal Self-Help Center and volunteers as a Guardian *ad Litem* for children in Delaware's foster care system. He also is a member of the Delaware State Bar Association and the Melson-Arsht Inns of Court.

Mr. Gonser resides in Wilmington with his wife and five children.



Jeremy D. Anderson, Esq.

Mr. Anderson was appointed, to complete six years of a former Commissioner's seven-year term, on June 30, 2011. His term will expire on June 30, 2017.

Mr. Anderson, a principal at the law firm of Fish & Richardson, PC, leads and tries corporate and complex commercial cases in the Delaware Court of Chancery. Mr. Anderson handles technology-related cases that are brought to protect and defend the intellectual property of companies across several industry sectors such as Life Sciences, Computer Software, and Media and Entertainment. He has successfully represented clients in actions involving non-practicing entities (NPEs) regarding the fraudulent transfer of patents and breaches of covenants not to sue. He obtained a motion to dismiss a multi-forum shareholder derivative lawsuit that was based on his client's substantial monetary settlement with the federal government recently, and in another case defended a preliminary injunction seeking to stop a technology company from filing a patent infringement action in federal court.

As the head of Fish & Richardson's Corporate Governance and Chancery Litigation Practice, Mr. Anderson also represents corporations in high-profile cases involving mergers and acquisitions, stock appraisal, indemnification of officers and directors, demands for corporate records and misappropriation of trade secrets.

Mr. Anderson is the co-author of Technology Litigation in the Delaware Court of Chancery, a treatise that provides comprehensive analysis of technology-related claims such as breach of fiduciary duty, misappropriation of trade secrets, breach of contract, unfair competition, civil conspiracy, and aiding and abetting. He is a thought leader on stock appraisal actions, and has authored articles that have been quoted in the Wall Street Journal, New York Times, Financial Times and Bloomberg. He frequently contributes to the "Chancery Daily" as a guest columnist and to Fish & Richardson's commercial litigation blog.

Mr. Anderson is a member of the Delaware Bar Association, where he served as Assistant to the President and as member of the Executive Committee from 2010-2011. In October 2007, Mr. Anderson founded the Delaware Chapter of the J. Reuben Clark Law Society, a service organization that strives to promote fairness and virtue founded on the rule of law. He has been named a "Delaware Rising Star" by Super Lawyers in multiple years.

Mr. Anderson received his law degree from Georgetown University Law Center, in Washington, D.C., where he was the Senior Editor for Law and Policy in International Business. After graduation, he clerked for the Honorable

Kent A. Jordan, United States District Court for the District of Delaware.

Mr. Anderson resides in Hockessin, Delaware.

D. Commission Staff

Deborah J. Moreau, Esq. Commission Counsel

As an independent agency, the Commission appoints its own attorney. 29 *Del. C.* § 5809(12). Ms. Moreau was appointed in June 2013, replacing the Commission's previous counsel of 18 years.

A Widener University School of Law graduate (*cum laude*), Ms. Moreau was a member of the Delaware Journal of Corporate Law. During law school she received two awards for her writing submissions. The Herman V. Belk Memorial Award was given in recognition of excellence in writing for an article written to gain admission to the law review in 2003. In 2004, she received the Donald E. Pease Best Student Article Award. Ms. Moreau's (*ne* Buswell) award-winning article was published in the law review. (Foreign Trade Antitrust Improvements Act: A Three Ring Circus – Three Circuits, Three Interpretations (Delaware Journal of Corporate Law, Vol. 28, No. 3, 2004)). The article has been cited in numerous professional materials. During her third year of law school, Ms. Moreau worked as an intern at the Delaware Department of Justice and was provisionally admitted to the Delaware Bar under Delaware Supreme Court Rule 55. That early admission allowed Ms. Moreau to prosecute misdemeanor cases in Family Court before graduation from law school.

Ms. Moreau was formally admitted to practice law in Delaware in 2004. The

following year she was admitted to the

U.S. Third Circuit Court of Appeals. Ms. Moreau continued her career at the Delaware Department of Justice as a Deputy Attorney General for the Criminal Division. While she was a prosecutor, Ms. Moreau handled hundreds of cases, in a variety of courts. She has practiced in Family Court, the Court of Common Pleas and Superior Court. Her varied caseloads included domestic violence, juvenile crime, sexual assaults, guns, drugs, property, robbery, burglary, and murder. Ms. Moreau's work as a prosecutor allowed her to gain extensive trial experience.

Ms. Moreau resides in Harrington, Delaware with her husband.

Administrative Assistant Jeannette Longshore

Jeannette Longshore was hired in 2006, as a temporary employee when the Commission's full-time administrative specialist was absent. She was hired full-time in June 2007.

Ms. Longshore worked at Delaware Technical Community College, Hewlett-Packard, and Agilent Technologies. She has experience in Microsoft Word, Excel, Access, and other computer skills. She performs the day-to-day administrative specialist functions, and updates the Commission's calendar of events on its web site with its agenda and minutes, and attends and takes minutes at the meetings, etc. She has

completed courses on the State Budget and Accounting; Program Management Office Training; and Grammar and Proofreading. Ms. Longshore has become proficient in the technical aspects of the Public Integrity Reporting System.

Ms. Longshore volunteers at The Emmanuel Dining Hall in Wilmington, Delaware, feeding the homeless.



III. Laws Administered by the Commission

❖ Subchapter I, Code of Conduct

Executive Branch and local government ethics;

Policy

State or local employees or officials holding dual government jobs with procedures to monitor and prevent “double-dipping;”

❖ Subchapter II, Financial and Organization Disclosures

Executive, Legislative and Judicial Branch public officer’s annual report of financial interests, such as assets, creditors, income, and gifts. All State elected officials and State candidates must also disclose private organizations of which they are a Board or Council member.

❖ Subchapter IV, Lobbying

Lobbyists’ registration, authorization, expense reports, and specific legislative or administrative actions on which they are lobbying State officials or employees.

❖ Subchapter III, Compensation

A. Subchapter I, Code of Conduct – Ethical Standards

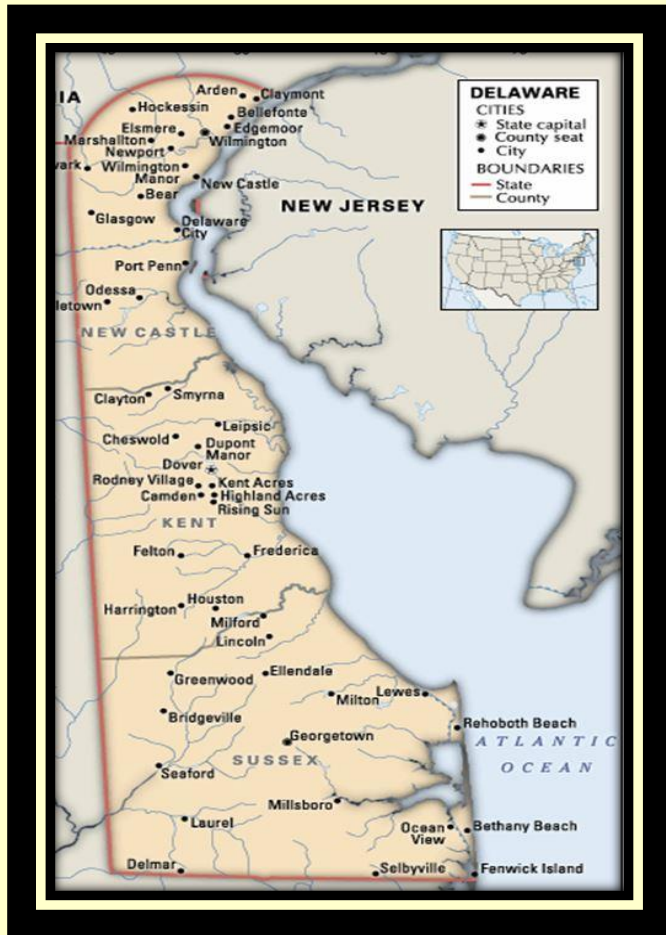
Purpose and Jurisdiction:

Twelve (12) rules of conduct set the ethical standards for “State employees,” “State officers,” and “Honorary State Officials,” in the Executive Branch. 29 *Del. C.* § 5804(6), (12) and (13). It also applies to local governments, unless the local government has a PIC-approved Code that is as stringent as State law. 29 *Del. C.* § 5802(4). The purpose is to instill the public’s respect and confidence that employees and officials will base their actions on fairness, rather than bias, prejudice, favoritism, etc., arising from a conflict, or creating the appearance thereof. 29 *Del. C.* § 5802.

Personal Jurisdiction – State Level:

The Code of Conduct applies to all Executive Branch employees (rank and file, including part-time), officers (elected and appointed senior level Executive Branch officials), and honorary State officials (appointees to more than 300 Boards and Commissions). Approximately 52,000 persons are in those State categories.

Personal Jurisdiction – Local Level:



At the local level, the number of employees, officers and officials in the local governments over which the Commission has jurisdiction is unknown.

In **2016**, local governments who had adopted their own Codes of Conduct included: New Castle County, Dover, Lewes, Millsboro, Newark, Smyrna, Delaware City, and Wilmington. As they have their own Code, the Commission no longer has jurisdiction over their employees, officers, and appointed officials. The remaining 49 local governments are under PIC's

jurisdiction. In 2013, PIC approved a proposed Code of Conduct for the Town of Dewey Beach which has not yet been formally adopted by the town council.

Subject Matter Jurisdiction:

The Code of Conduct restricts participating in an official government capacity if there is a personal or private interest in a matter before them; bars all employees, officers and officials from representing or assisting a private enterprise before their own agency in their private capacity; bars officers (senior level officials) from representing or assisting a private enterprise before any agency; limits public servants in obtaining contracts with the government entity with which they serve; restricts their activities for 2 years after

terminating State employment. 29 *Del. C.* § 5805. The law also restricts acceptance of gifts, outside employment or anything of monetary value; use of public office for personal gain or benefit; improper use or disclosure of government confidential information; and/or use the granting of sexual favors as a condition, either explicit or implicit, for an individual's favorable treatment by that person or a state agency. 29 *Del. C.* § 5806. The Code also bars conduct that creates a justifiable impression, or that may “raise public suspicion,” of improper conduct, 29 *Del. C.* § 5802(1) and § 5806(a). Thus, the Commission considers if there is an appearance of impropriety.

The appearance of impropriety, under the Code of Conduct, is evaluated using the Judicial Branch standard, as interpretations of one statute may be used to interpret another when the subject (ethics) and the standard (appearance of an ethics violation) apply in both (public servant) cases. *Sutherland Stat. Constr.* § 45-15, Vol. 2A (5th ed. 1992).

Penalties:

Both criminal and administrative penalties may be imposed.

(1) Criminal Prosecution: The General Assembly, in passing the law, found that some standards of conduct are so “vital” that the violator should be subject to criminal penalties. 29 *Del. C.* § 5802(2). Four (4) rules carry criminal penalties of up to a year in prison and/or a \$10,000 fine. 29 *Del. C.* § 5805(f). Those rules are that employees, officers, and honorary officials may not: (1) participate in State matters if a personal or private interest would tend to impair judgment in performing official duties; (2) represent or assist a private enterprise before their own agency and/or other State agencies; (3) contract with the State absent public notice and bidding/arm’s length negotiations; and

(4) represent or assist a private enterprise on certain State matters for 2 years after leaving State employment. 29 *Del. C.* § 5805(a)(2). Beyond referring suspected Code violations for criminal prosecution (see more information below), if a majority of Commissioners finds reasonable grounds to believe a violation of other State or Federal laws was violated, they may refer those matters to the appropriate agency. 29 *Del. C.* § 5807(b)(3) and(d)(3); § 5808(A)(a)(4); and § 5809(4).

In 2015, PIC's criminal enforcement power was enhanced by the Attorney General's creation of the Office of Civil Rights and Public Trust ("OCRPT"). Now, when PIC uncovers a Code of Conduct violation for which there are criminal penalties, the matter may be referred to OCRPT for further investigation and possible criminal prosecution. In **2016**, PIC referred one matter, involving allegations of nepotism, to the Attorney General's office for further investigation and possible prosecution. That matter is still pending. PIC also received a response from the OCRPT regarding a matter referred by PIC in 2015. In that matter, the OCRPT declined prosecution of a post-employment case because the former state employee had accepted a position with a quasi-governmental entity and thus did not meet the definition of 'private enterprise' as set forth in 29 *Del. C.* §§ 5805(d) and 5804(11).

(2) Administrative Sanctions: Violating the above rules may, independent of criminal prosecution, lead to administrative discipline. 29 *Del. C.* § 5810(h).

Under some rules both criminal and/or administrative sanctions may occur, but violating the following rules results only in administrative action: (1) improperly accepting gifts, other employment, compensation, or anything of monetary value; (2) misuse of public office for private gain or unwarranted privileges; and (3) improper use or disclosure of confidential information. 29 *Del. C.* § 5806(b), §5806(e) and § 5806(f) and (g).

Disciplinary levels: (1) reprimand/censure of any person; (2) removing, suspending, demoting, or other appropriate disciplinary action for persons other than elected officials; or (3) recommending removal from office of an honorary official. 29 *Del. C.* § 5810(h).



B. Subchapter II, Financial and Organizational Disclosure Requirements

Both the financial disclosure report and the organizational disclosure are snapshots of any interest held by an official as of the date reported. The decision on whether those interests, or any acquired after that date but not yet reported, create a conflict of interest, is based on the conflict laws for that particular officer. Executive Branch elected officers are subject to the State Code of Conduct; Legislators are subject to the Legislative Conflicts of Interest law; and Judicial officers are subject to the Judicial Code of Conduct.

FINANCIAL DISCLOSURE:

Purpose:

Subchapter II is meant to instill the public's confidence that its officials will not act on matters if they have a direct or indirect personal financial interest that may impair objectivity or independent judgment. 29 Del. C. § 5811. Compliance, in part, is insured

when they report financial interests shortly after becoming a public officer, (14 days), and each year thereafter on March 15, while a public officer. 29 *Del. C.* § 5813(c). Identifying the interests helps the public officer recognize a potential conflict between official duties and personal interests that may require recusal or ethical guidance.

Personal Jurisdiction:

More than 350 “public officers” in the Executive, Legislative, and Judicial branches must file financial disclosure reports within 14 days of becoming a public officer and on March 15 each year thereafter. 29 *Del. C.* § 5813(c). Filers include: All Executive and Legislative Branch elected officials; all cabinet secretaries, division directors, and their equivalents; all members of the judiciary; and candidates for State office. 29 *Del. C.* § 5812(n)(1). PIC received 350 Financial Disclosure filings between January 1st and March 15th in **2016**. As State candidates must also file, the number of filers per year varies depending on the number of candidates in a given year. Because **2016** was an election year, PIC received an additional 43 Financial Disclosures between April and November from candidates running for state-wide office.

Subject Matter Jurisdiction:

Assets, creditors, income, capital gains, reimbursements, honoraria, and gifts exceeding \$250 are reported. Aside from their own financial interests, officials must report: assets held with another if they receive a direct benefit, and assets held with their spouses and children, regardless of direct benefits. 29 *Del. C.* § 5813.

Penalties:

Willful failure to file a report is a Class B misdemeanor. Knowingly filing false

information is a Class A misdemeanor. 29 *Del. C.* § 5815. The Commission may refer suspected violations to the Commission Counsel for investigation and to the AG for investigation and prosecution. *Id.* The penalties are: (1) up to six months incarceration and/or a fine of up to \$1,150 for a Class B misdemeanor, 11 *Del. C.* § 4206(b); and (2) up to one year incarceration and a fine of up to \$2,300 for a Class A misdemeanor, 11 *Del. C.* § 4206(a). The Court may also require restitution or set other conditions as it deems appropriate. 11 *Del. C.* § 4206(a) and (b).

ORGANIZATIONAL DISCLOSURES:

Purpose:

Potential conflicts can arise from associational interest, even without a financial interest, and if the organization seeks action by the General Assembly, the Governor, Lt. Governor, Treasurer, Auditor, Insurance Commissioner, or Attorney General, the annual reporting reminds them of that possibility. The reports are public records, and may be requested on the [FOIA form](#), on the Commission's website. That allows the public to also monitor the financial and associational interests of these officials.

Personal Jurisdiction:

State elected officials and Candidates for State office are required to disclose their memberships on councils or boards. 29 *Del. C.* § 5813A. Other public officers, e.g. cabinet secretaries, division directors, and their equivalents are not required to file this information.

Subject Matter Jurisdiction:

Elected officials and candidates must disclosure the name and address of every nonprofit organization, (excluding religious organizations), civic association, community association, foundation, maintenance organization, or trade group incorporated in the State or having activities in the State, or both, of which the person is a council member or board member. 29 *Del. C.* § 5813A.

Penalties:

Same as for financial disclosure reporting violations.



C. Subchapter III - Compensation Policy – “Anti-Double Dipping Law”

Purpose:

Some elected and paid appointed officials hold a second job with State agencies or local governments. Taxpayers should not pay an individual more than once for overlapping hours of the workday. 29 *Del. C.* § 5821(b). To build taxpayers’ confidence that such employees and officials do not “double-dip,” those with dual positions must have their Supervisor verify time records of hours worked at the full-time job on any occasion that they miss work due to the elected or paid appointed position. 29 *Del. C.* § 5821(c) and § 5822(a). The full-time salary may be prorated, unless the dual employee uses leave, compensatory time, flex-time or personal time. *Id.*

Jurisdiction:

The number of people to whom this law applies varies based on how many State and local government employees hold dual, government (state, municipal, county)

employment.

For those holding dual positions, who also are subject to the Code of Conduct—Executive Branch and local governments--the “double-dipping” restrictions are reinforced by the ethical limits on holding “other employment.” 29 *Del. C.* § 5806(b). Complying with the ethics provision is extra insurance against “double-dipping,” and also helps insure the “other employment” does not raise ethical issues. Further assurance against double-dipping is that the statute requires the Auditor to annually audit time records. 29 *Del. C.* § 5823. Generally, the audit is comprised of time records for General Assembly members who are also State employees.

In January 2017, PIC received the Dual Compensation Report for CY 2015 and CY **2016** from the State Auditor’s Office. (See Appendix A). Like the previous report which covered CY 2014, the report found that the State does not have adequate rules and procedures in place to allow for adequate oversight of the Dual Compensation law. Most significantly, the population of individuals who received dual compensation from government entities was unable to be determined from data available to PIC. While PIC does collect financial information from the State’s Public Officers, it does not have jurisdiction to collect that information from individuals employed by towns, municipalities or counties within the State who may collect dual government income. Substantial changes to the Dual Compensation law are necessary to allow PIC to gather the information necessary to properly administer this portion of the code. To that end, HB 252 was introduced in the General Assembly in January of **2016**, attempting to remedy some of the problems identified in the State Auditors CY 2014 report. The Bill was never released from committee. PIC supports any effort to strengthen and improve our ability

to collect and oversee the Dual Compensation law. That includes collecting and analyzing Financial Disclosures from municipal and county employees, as long as it receives additional manpower and resources to ensure the additional responsibilities are properly administered.

Penalties:

Aside from pro-rated pay where appropriate, discrepancies are reported to the Commission for investigation, and/or the AG for investigation and prosecution under any appropriate criminal provision. 29 *Del. C.* § 5823.



D. Subchapter IV – Lobbyist Registration and Reporting

Purpose:

Individuals authorized to act for another, whether paid or non-paid, must register with the Commission if they will be promoting, advocating, influencing or opposing matters before the General Assembly or a State agency by direct communication. 29 *Del. C.* § 5831. Lobbying registration and reporting informs the public and government officials whom they are dealing with so that the voice of the people will not be “drowned out by the voice of special interest groups.” *United States v. Harris*, 347 U.S. 612 (1954).

Jurisdiction:

When PIC began administering the lobbying registration law in 1996, there were approximately 200 organizations represented by lobbyists. At the end of **2016**, 334 lobbyists, representing 1076 organizations, were registered.

Reporting Requirements:

Each lobbyist is to file quarterly reports revealing direct expenditures on General Assembly members and/or State agency members. 29 *Del. C.* § 5835(c). That results in 4304 expense reports. If the expense exceeds \$50, the lobbyist must identify the public officer who accepted the expenditure, and notify the official of the value. *Id.* In 2016, lobbyists reported expenditures totaling \$77,194.83. In addition to reporting expenditures, lobbyists are also required to report their lobbying activity. Lobbyists must report legislation by bill number or administrative action by number or title, within 5 business days of lobbying a State official. 29 *Del. C.* § 5836. “Lobbying” consists of direct communication with a State employee or official, including General Assembly members, for the purpose of advocating, promoting, opposing, or influencing legislation or administrative action. 29 *Del. C.* § 5831(5). The law also required that all registration, expense reports, and the new “Lobbying Activity Report” be filed online. 29 *Del. C.* § 5832(a).

Beyond the “Lobbying Activity Reports” that the lobbyists must file, the 2012 legislation required PIC to report all lobbying activity to the General Assembly on at least a weekly basis while the General Assembly is in session. 29 *Del. C.* § 5836(d). Further, it required that a [searchable public database](#) be created so that the public could search for information on the names of lobbyists and their employers, expense reports, and the Lobbying Activity Report. 29 *Del. C.* § 5836(d).

In 2013, the Public Integrity Reporting System (PIRS) was created in an effort to accommodate the new legislative reporting requirements. The new database was announced as the Web 2.0 Award winner in the “Harnessing the Power of Civic Media” category by the Public Technology Institute (PTI). Users of PIRS can see which lobbyists are involved in specific legislation or administrative regulation, and view lobbyists’

employers and financial disclosures. The new system also made it easier for lobbyists and public officials to submit required lobbying and gift-related reports online. The PIRS online interface is also mobile-friendly, allowing lobbyists to report, and citizens to search using smartphones, tablets and other mobile devices.

Penalties:

Administrative: PIC may impose the administrative penalty of cancelling a lobbyist's registration for failure to timely file their expense reports at the end of each calendar quarter. They may not re-register or act as a lobbyist until all delinquent authorizations and/or reports are filed. *Id.* Obviously, this affects their ability to represent an organization in which they are interested enough to volunteer, or affects their job performance if they cannot perform their paid duties. Recognizing the impact on lobbyists if their registrations are cancelled, the Commission sends several failure-to- file notices via e-mail, followed by certified letter. If the lobbyist does not respond, before their registration is cancelled, the organization which they represent is also notified. The names of delinquent filers are available on PIC's website by searching lobbyist reports by quarter.

Over time the administrative penalty has ceased to be an effective compliance tool. In the first quarter of 2014, there were 79 delinquent lobbyists. By the end of the third quarter there were over 100 delinquent lobbyists. Compare those numbers with a total of 15 delinquent lobbyists for the fourth quarter of 2013.

Financial: As a result of the increasing number of delinquent filers, in 2014 PIC successfully introduced legislation to impose a financial penalty on lobbyists for failure to file expense reports in a timely manner. Beginning in 2015, delinquent lobbyists were required to pay a \$25 fine for the first day of their delinquency. Thereafter, an additional

\$10 per day accumulated to a maximum fee of \$100. Lobbyists may not resume lobbying until all fees have been paid and all delinquent reports have been filed. In the fourth quarter of **2016**, the number of delinquent filers was reduced to 3. In **CY2016** PIC collected \$4225 in late fees.

Criminal: Any person who knowingly fails to register or knowingly furnishes false information may be found guilty of a misdemeanor. 29 *Del. C.* § 5837. Unclassified misdemeanors carry a penalty of up to 30 days incarceration and a fine up to \$575, restitution or other conditions as the Court deems appropriate. 11 *Del. C.* § 4206(c).



IV. Methods for Achieving Compliance

(1) Training and Publications - 29 Del. C. § 5808(A)(a)(1)

As the Commissioners normally meet monthly, the day-to-day work of providing guidance and facilitating compliance with the laws, conducting seminars and workshops, publishing materials, etc., are the Commission Counsel's statutory duties. *Id.*

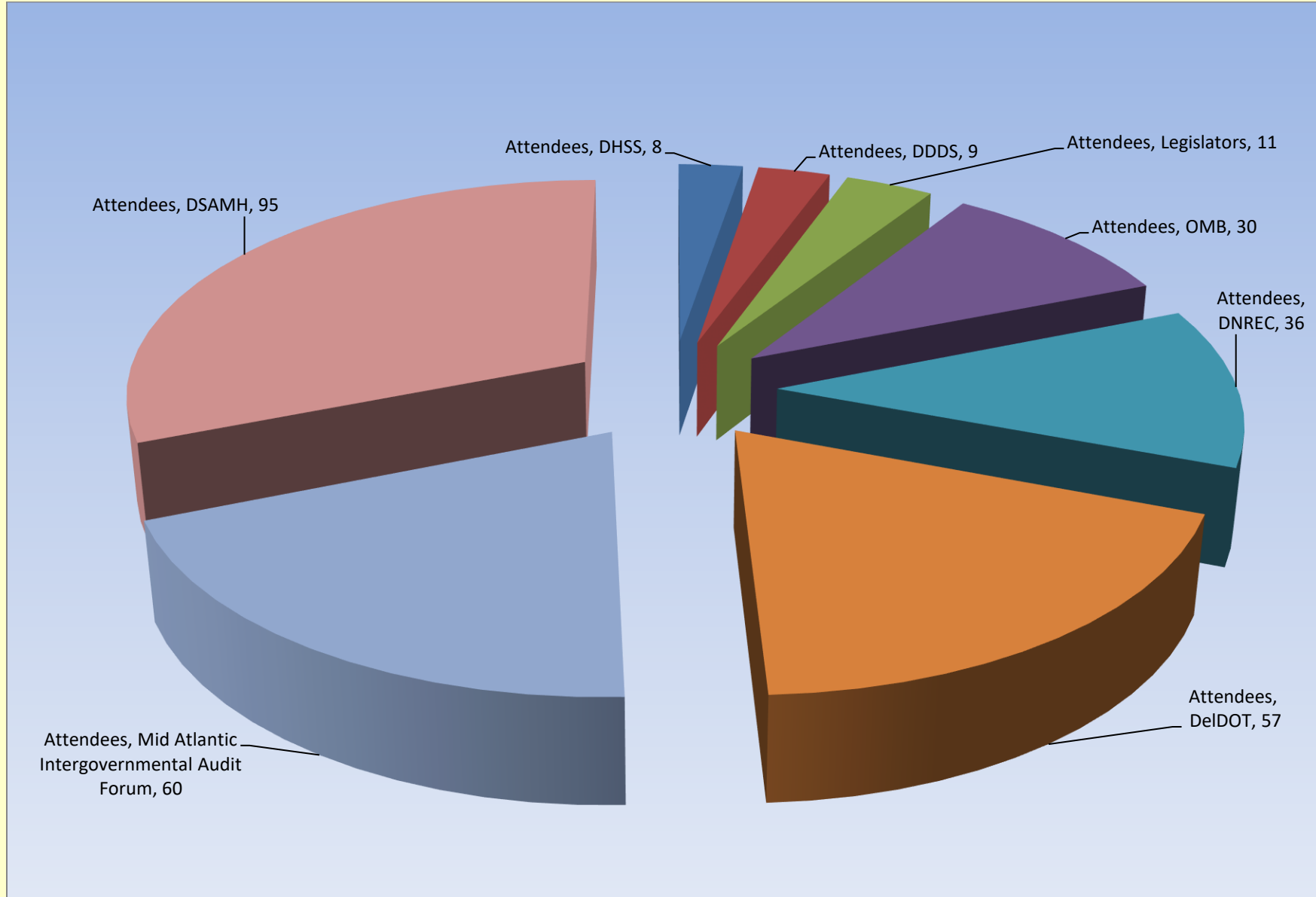
To best assist government officials and lobbyists in understanding and complying with the law, the Commission's primary focus is on training. Training is reinforced by handouts and publications which can be reviewed later. For quick reference, an Ethics Brochure with the 12 rules of conduct with some brief case examples is provided. It also has procedures for obtaining advice or waivers, and filing complaints.

Opinion synopses are available on PIC's website. The synopses are sorted by topic and include a summary of all matters decided by the Commission from 1991 to 2016. As individuals encounter similar situations, they can refer to the cases. The web site also includes the Delaware Code of Conduct, all Ethics Bulletins, a brochure on Delaware's gift laws, the Commission's rules and its Annual Reports. For Financial Disclosure filers and Lobbyists, the web site has instructions for on-line filing. Lobbyists can link to the Legislative Bill Drafting Manual if drafting legislation for clients. The web site also includes links to related laws such as the Legislative Conflicts of Interest Law and the Judicial Code of Conduct.

In **2016**, the Commission presented 11 training classes to a total of 306 attendees. The training classes were presented to a wide variety of state, county, and legislative entities. In an effort to reach more State employees, PIC created an online training module which is available through the Office of Management and Budget's

Training Website. The module is a 30 minute introduction to common ethics issues facing State employees. It does not replace the more in-depth, in-person training sessions. In **2016**, 774 employees completed the training module.

2016 Live Ethics Training by Agency

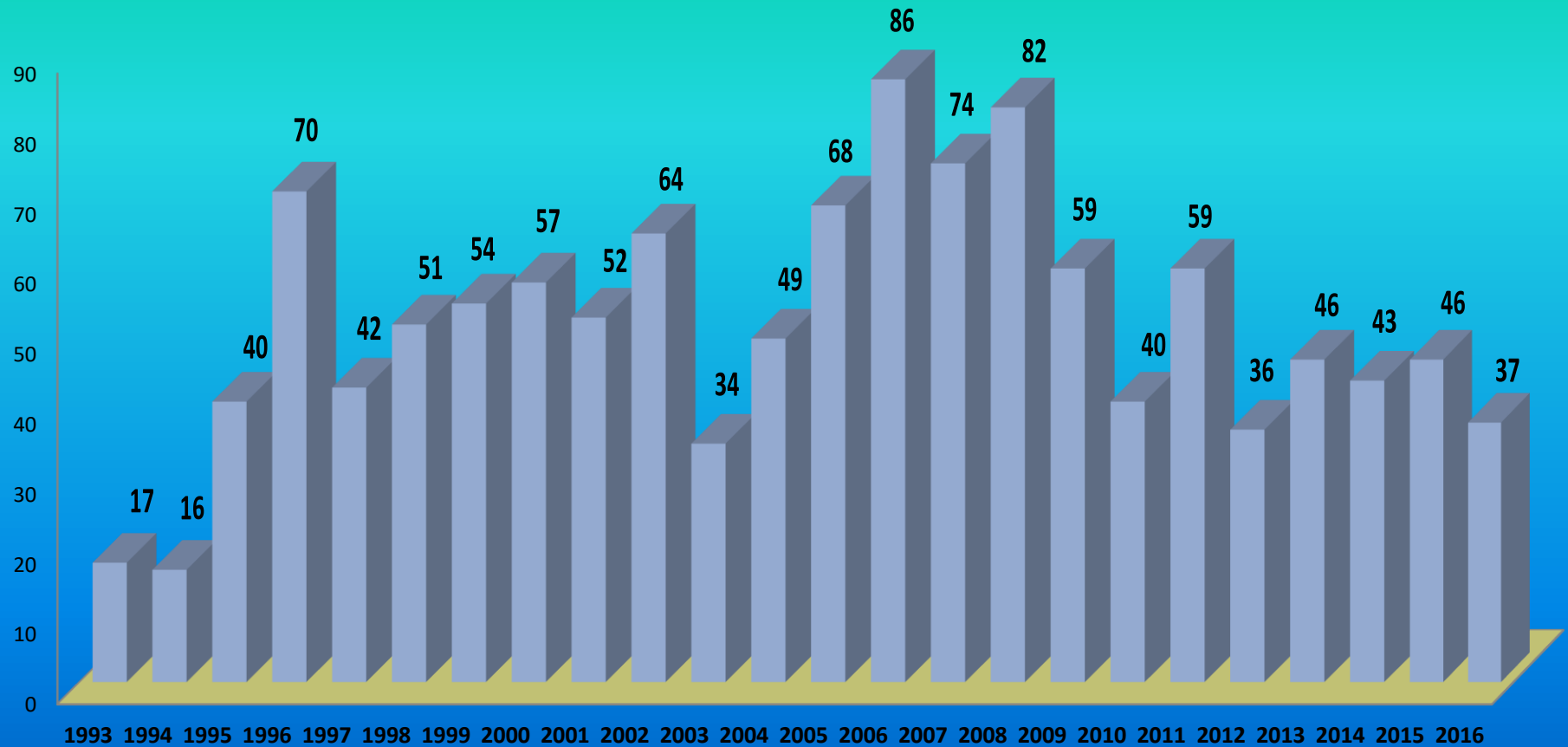


(2) Advisory Opinions - 29 Del. C. § 5807(c).

Any employee, officer, honorary official, agency, or lobbyist may seek the Commission's advice on the provisions applying to them. While training and publications expose those subject to the law to a broad and general view, the Commission's advisory opinions and waiver service on particular fact situations gives the individual personal attention on a potential conflict, guiding them through the steps that would prevent crossing the ethics line. While advisory opinions are non-binding, if the individual follows the advice, the law protects them from complaints or disciplinary actions. 29 Del. C. § 5807(c). Synopses of those opinions later become learning tools at training classes and are available on our website.

In **2016**, PIC acted on 37 requests for written advice. 36 formal advisory opinions were issued by the Commission and Commission Counsel responded to 1 requests for written informal advice. (See chart below). The number of requests for opinions has been fairly stable over the past four years. This is likely due to the fact there have not been any changes to the Code of Conduct. The Commission typically sees spikes in the number of requests when there is a change in the Code.

No. of Opinions Issued 1991 - 2016



(A) Waivers - 29 Del. C. § 5807(a)

Any employee, officer, honorary official, agency, or lobbyist may seek a waiver. In rare cases, an individual may need to deviate from the law. The Commission may grant waivers if: (1) the literal application of the law is not necessary to serve the public purpose; or (2) an undue hardship exists for the agency or employee. Waivers are open records so the public knows why a deviation from the law was allowed in a particular case. As some standards are so “vital” that they carry criminal penalties, making the information public further instills confidence that an independent body makes the decision. It also gives the public better exposure to the Commission’s deliberation process which may not be as clear when only a synopsis, that cannot identify the individual by name or through sufficient facts, is permitted.

In **2016**, two waivers were granted. *Commission Op. Nos. 16-09, 16-52* (See Appendices B & C). When a waiver is granted, the proceedings become a matter of public record. Those decisions are also available on the Commission’s website.

(B) Complaints - 29 Del. C. § 5810(a).

Any person, public or private, can file a sworn complaint. The Commission may act on the sworn complaint, or its own initiative. A majority (4) must find “reasonable grounds to believe” a violation may have occurred. 29 Del. C. § 5808(A)(a)(4). If probable cause is found, the Commission may conduct a disciplinary hearing. 29 Del. C. § 5810. The person charged has statutory rights of notice and due process. Violations must be proven by clear and convincing evidence. If a violation is found, the Commission may impose administrative discipline. 29 Del. C. § 5810(d). It may refer substantial evidence of criminal law violations to appropriate federal or State authorities. 29 Del. C. §

5810(h)(2). Frivolous or non-merit complaints, or those not in the Commission's jurisdiction, may be dismissed. 29 Del. C. § 5809(3).

In **2016**, the Commission received four properly submitted complaints. Two were dismissed for failure to properly allege a violation of the Code of Conduct. The remaining two were dismissed for lack of jurisdiction. One of those is on appeal in New Castle County Superior Court. A complaint must be in writing, allege violations of specific portions of the Code of Conduct with supporting facts, and be properly notarized. The correct form of notarization is below:

29 Del. C. § 4328(3) For a verification upon oath or affirmation:

State of.....

County of.....

Signed and sworn to (or affirmed) before me on (date) by (name(s) of person(s) making statement).

(signature of notarial officer)

(Seal)

(title and rank)

(my commission expires:.....)



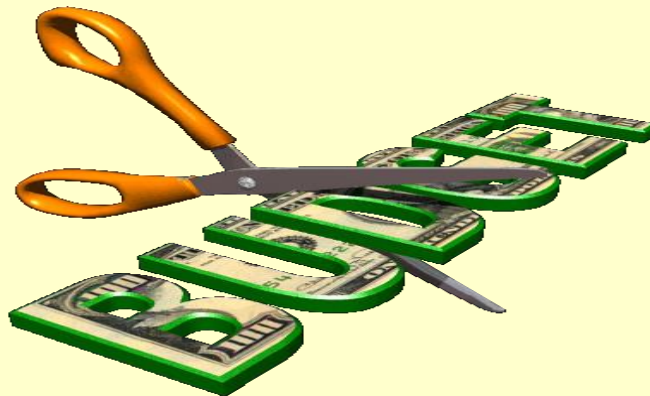
V. FOIA Requests

In **2016**, PIC responded to 29 requests for information under the Freedom of Information Act (FOIA). That number is more than double the 2015 requests, which is typical for an election year. The FOIA requests were submitted by a mix of news media, citizens, and private political organizations. Due to the efficiencies of the PIRS database, PIC was able to respond to all of those requests within 10 days.



VI. Funding

In **FY 2017**, which includes the last half of the 2016 calendar year, the General Assembly appropriated \$191,700 for PIC, with an operating budget of \$25,400. That amount is the smallest operating budget since PIC was created in 1996 when the operating budget was \$40,100. Today, PIC's operating budget is 37% less than in 1996. When adjusted for inflation, the operating budget has been **cut** by 58.2% over the past 20 years. Meanwhile, PIC's duties continue to increase.





VII. Legislation

PIC Sponsored Legislation:

During the 2016 legislative session PIC submitted one piece of legislation:

- HB 197—Sponsored by Rep. Ruth Briggs-King cleared up confusing language in the lobbying law regarding campaign contributions. Lobbyists do not report campaign contributions on their quarterly expense reports. However, 29 *Del. C.* § 5835(b)(6) only excepted campaign contributions made to members of the General Assembly. The statute was silent as to campaign contributions made to the five state elected offices (Governor, Lt. Governor, Treasurer, Insurance Commissioner and Auditor). The new language now makes clear that lobbyists are not to report campaign contributions of any kind.



VIII.Future Goals

The Commission's focus will be to continue to emphasize education of employees, officers, officials, and lobbyists with the limited resources at our disposal.

State of Delaware Office of Auditor of Accounts

Dual Employment Examination Engagement

Calendar Years Ended 2015 and 2016

Issuance Date: January 17, 2017

R. Thomas Wagner, Jr., CFE, CGFM, CICA
Auditor of Accounts

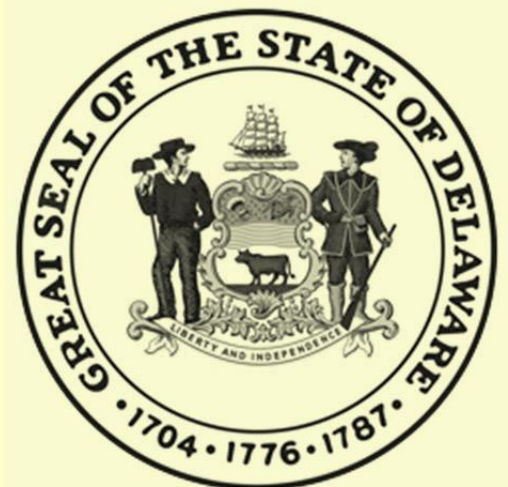


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Background

29 Delaware Code (Del. C.) Ch. 58, Subchapter III, referred to as the Dual Employment law, was enacted in July 1986. The law states:

§5821. Findings.

- (a) There are numerous elected state officials and other paid appointed officials who are also employed by state agencies, educational and other institutions, and other jurisdictions of government within the State.
- (b) The members of the General Assembly believe that the taxpayers of Delaware should not pay an individual more than once for coincident hours of the workday.
- (c) The State should have in place clear policies and procedures to ensure that taxpayers of the State as a whole, and of its various governmental jurisdictions, are not paying employees or officials from more than 1 tax-funded source for duties performed during coincident hours of the workday.

§5822. Policy.

- (a) Any person employed by the State, or by any political subdivision of the State, including but not limited to any county, city or municipality, who also serves in an elected or paid appointed position in state government or in the government of any political subdivision of the State, including but not limited to any county, city or municipality, shall have his or her pay reduced on a prorated basis for any hours or days missed during the course of the employee's normal workday or during the course of the employee's normal workweek while serving in an elected or paid appointed position which requires the employee to miss any time which is normally required of other employees in the same or similar positions.

§5823. Audits; penalty.

- (a) The State Auditor shall conduct an annual audit of the time records which have been kept by the supervisors or school board¹ in accordance with §5822(b) and (c) of this title to determine whether or not an employee was paid from more than 1 tax-funded source for working coincident hours of the day.
- (b) Any discrepancy found by the State Auditor shall be reported to the Public Integrity Commission for investigation pursuant to §5810 of this title and/or to the Office of the Attorney General for possible prosecution under §876 of Title 11 (tampering with public records in the first degree) and any other appropriate section.

Historically, the Office of Auditor of Accounts (AOA) has encountered great difficulty in performing this engagement. The State has not had policies or procedures to monitor or identify dually employed individuals as defined by 29 Del. C. §5822(a). As a result, AOA has been unable to identify a complete population of dually employed individuals for testing. In addition, the State has not maintained time records for elected² or appointed officials; therefore, AOA has been unable to test for the proper treatment of dual employment hours and has been unable to conclude if the officials were paid from more than one tax-funded source for working coincident hours of the day. As such, AOA has been unable to determine

¹ Although school board members are elected officials, 14 Del. C. §1046 prohibits school board members from receiving compensation for their services. Therefore, school board members do not meet the definition of dually employed individuals.

² There is no provision in the Delaware Code that permits a legislator's General Assembly pay to be docked when a legislator is absent from legislative business. Further, the General Assembly does not maintain time records that AOA could review for coincident time.

if the State was in compliance with the Dual Employment law due to the above scope limitations. Despite repeated findings, advice letters from the Office of the Attorney General, and advisory publications by the State Public Integrity Commission, these difficulties still exist.



STATE OF DELAWARE
OFFICE OF AUDITOR OF ACCOUNTS

R. THOMAS WAGNER, JR., CFE, CGFM, CICA
AUDITOR OF ACCOUNTS

Independent Accountant's Report

Deborah Moreau, Esq.
Legal Counsel
State Public Integrity Commission
Margaret O'Neill Building
Suite 3
410 Federal Street
Dover, Delaware

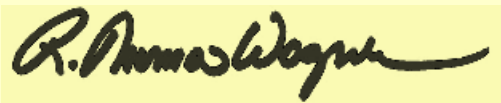
We were engaged to examine the State of Delaware's compliance with 29 Del. C. Ch. 58, Subchapter III, the Dual Employment law, for the Calendar Years 2015 and 2016. Management of the State of Delaware is responsible for compliance with the Dual Employment law. Our responsibility is to express an opinion on the State's compliance with the Dual Employment Law based on conducting the examination in accordance with attestation standards established by the American Institute of Certified Public Accountants.

As discussed in the *Schedule of Findings*, we continued to encounter several difficulties in obtaining the information needed to identify and test dually employed individuals as defined by 29 Del. C. §5822(a). The State does not have policies and procedures to monitor or identify dually employed individuals as defined by 29 Del. C. §5822(a). As a result, we were unable to identify a complete population of dually employed individuals for testing. In addition, the State does not maintain time records for elected or appointed officials; therefore, we are unable to test for the proper treatment of coincident hours paid from more than one tax-funded source.

In accordance with *Government Auditing Standards*, we are required to report all deficiencies that are considered to be significant deficiencies or material weaknesses in internal control; fraud and noncompliance with provisions of laws or regulations that have a material effect on the State's compliance with the Dual Employment law; and any other instances that warrant the attention of those charged with governance; noncompliance with provisions of contracts or grant agreements, and abuse that has a material effect on the subject matter. We are also required to obtain and report the views of responsible officials concerning the findings, conclusions, and recommendations, as well as any planned corrective actions. We performed our examination to express an opinion on whether the State is in compliance with the Dual Employment law and not for the purpose of expressing an opinion on internal control over the Dual Employment law or on compliance and other matters; accordingly, we express no such opinions. Our examination disclosed certain findings that are required to be reported under *Government Auditing Standards* and those findings, along with the views of responsible officials, are described in the attached *Schedule of Findings*, as Findings #1 and 2.

Because of the limitation on the scope of our examination discussed in the preceding paragraphs, the scope of our work was not sufficient to enable us to express, and we do not express, an opinion on whether the State complied, in all material respects, with the Dual Employment law for the Calendar Years 2015 and 2016, based on criteria set forth in 29 Del. C. Ch. 58, Subchapter III.

This report is intended solely for the information and use of the Public Integrity Commission and is not intended to be, and should not be, used by anyone other than these specified parties. However, under 29 Del. C. § 10002(1), this report is public record and its distribution is not limited. This report, as required by statute, was provided to the Office of the Governor, Office of the Controller General, Office of the Attorney General, and Office of Management and Budget.

A handwritten signature in black ink, reading "R. Thomas Wagner, Jr.", is displayed on a light yellow rectangular background.

R. Thomas Wagner, Jr., CFE, CGFM, CICA
Auditor of Accounts
Dover, Delaware

January 13, 2017

Schedule of Findings

Finding #1: Lack of Complete Population of Dually Employed Individuals

Criteria

29 Del. C. §5822(a) defines dually employed individuals as, “Any person employed by the State, or by any political subdivision of the State, including but not limited to any county, city or municipality, who also serves in an elected or paid appointed position in state government or in the government of any political subdivision of the State, including but not limited to any county, city or municipality...”

29 Del. C. §5808(a) states it is the State Public Integrity Commission’s (PIC) responsibility “...to administer and implement this chapter [29 Del. C. Ch. 58], and to perform such other responsibilities as may be entrusted to it by law.” However, there is currently no requirement for dually employed individuals to report any information to the PIC.

29 Del. C. §5813 requires public officers to file a financial disclosure report with the PIC. 29 Del. C. §5812(n)(2) specifically excludes “...elected and appointed officials of political subdivisions of the State, of public school districts of the State, and of state institutions of higher learning” from this requirement.

Condition

The State does not have policies and procedures to monitor or identify dually employed individuals as defined by 29 Del. C. §5822(a).

We requested the population of dually employed individuals from the PIC; however, the office was unable to provide a complete population for the period covered by our examination.

Cause

Due to the exclusions of Del. C. §5812(n)(2), the State lacks authority to monitor elected officials of political subdivisions. Further, the Dual Employment law does not currently require all dually employed individuals to report any information to the PIC.

Effect

The State does not maintain sufficient information to ensure all dually employed individuals are identified across the state.

Recommendation

The PIC should seek modification to the Dual Employment law to add a requirement for all dually employed individuals to report information annually to the PIC. Addition of this requirement would enable the PIC to maintain a complete listing of dually employed individuals.

Finding #2: Lack of Time Records**Criteria**

29 Del. C. §5822 states:

“(a) Any person employed by the State, or by any political subdivision of the State, including but not limited to any county, city or municipality, who also serves in an elected or paid appointed position in state government or in the government of any political subdivision of the State, including but not limited to any county, city or municipality, shall have his or her pay reduced on a prorated basis for any hours or days missed during the course of the employee’s normal workday or during the course of the employee’s normal workweek while serving in an elected or paid appointed position which requires the employee to miss any time which is normally required of other employees in the same or similar positions.

(b) Any day an employee misses work due to his or her elected or paid appointed position, he or she shall have his or her immediate supervisor verify a time record stating specifically the number of hours worked that day; said verification to take place at least once every pay period.

(c) All time records, so verified, shall be kept by the immediate supervisor until such time as they are required by the State Auditor.

(d) No employee shall be permitted to make up time during hours other than the normal workday for purposes of compensation. A normal workday is defined by Merit Rule 5.0200. A standard work schedule is defined by Merit Rule 5.0210.

(e) Any hours or days during which an employee uses vacation, personal, or compensatory days to which he or she is entitled shall not constitute hours or days which fall within the scope of this subchapter.

(f) School administrators whose duties require that they work regularly during summer months shall not be exempted from this chapter. If a school administrator shall have no immediate supervisor, the school administrator’s time shall be verified by the appropriate school board at its next regular or special meeting following any pay period in which said administrator missed work due to his or her elected or paid appointed position.”

Condition

The General Assembly does not maintain detailed time records that allow for the review of the hours spent at committee meetings or legislative sessions. Without this information, it is not possible to determine if a legislator incurred coincident time.

Cause

The General Assembly’s attendance records are limited to the time that legislative session began and whether or not the official was present during roll call. The time records do not include the time in which officials enter or exit a legislative session.

Effect

We were unable to test for the proper treatment of dual employment hours and cannot conclude if the officials were paid from more than one tax-funded source for working coincident hours of the day.

Recommendation

The General Assembly should improve the time-keeping process so that coincident hours spent for legislative duties can be identified, accounted for, and audited in accordance with the Dual Employment law. In addition, all entities with dually employed individuals should maintain time records in accordance with the Dual Employment law, sufficient to support whether an employee was paid for coincident hours of the day.

*Status of Prior Period Findings***Prior Period Finding**

Finding #1

Brief Description

Lack of Complete Population of
Dually Employed Individuals

Current Period Status

See current period finding.

Finding #2

Lack of Time Records

See current period finding.

Appendix A: State Public Integrity Commission's Response to Findings



STATE OF DELAWARE

DELAWARE STATE PUBLIC INTEGRITY COMMISSION

MARGARET O'NEILL BUILDING
410 FEDERAL STREET, SUITE 3
DOVER, DELAWARE 19901

TELEPHONE: (302) 739-2399
FAX: (302) 739-2398

January 13, 2017

The Honorable R. Thomas Wagner, Jr.
Auditor of Accounts
401 Federal Street, Suite One
Dover, DE 19901

RE: RESPONSE TO SCHEDULE OF FINDINGS

Dear Mr. Wagner,

The State Public Integrity Commission ("PIC") has received your report of the Dual Employment Examination for calendar years 2015 and 2016. PIC agrees with your findings and recommendations. However, we would like to offer the following response:

Finding #I: Lack of Complete Population of Dually-Employed Individuals

Response: (PIC) agrees that there are no mechanisms in place which could accurately capture the dual employment data described in 29 Del. C. § 5822(a). PIC only has statutory authority to gather Financial Disclosures (including sources of income) from Public Officers, 29 Del. C. § 5813(a). Falling within the definition of "Public Officer" are approximately 300 high level State employees including judges, members of the General Assembly, Cabinet Secretaries and Division Directors. 29 Del. C. § 5812. However, the vast majority of State employees are not included as those required to file financial information with the State. Nor does PIC have authority to gather dual income data from municipal employees of any city or town. Any estimate of the number of dually-employed individuals would be purely speculative but would certainly greatly exceed the number of Financial Disclosures filed with PIC every year.

The recommendation that PIC seek modifications to the Dual Employment Law to compel all dually-employed individuals within the State to file information with our Commission is, without a doubt, the solution to the problem. However, during the last legislative session, HB 252, proposing modifications to the Dual Employment law failed to garner enough support in the General Assembly to be moved out of committee. Furthermore, even if the legislative initiative had been successful, PIC does not currently have the necessary resources (manpower and funding) to meet the additional challenges which would accompany such legislation. Extending PIC's jurisdiction to include gathering financial disclosure information from county and town employees would require a costly re-design and overhaul of our database, the Public Integrity Reporting System ("PIRS"), as well as additional personnel to oversee the additional work. As you know, the State is facing a large budget shortfall for the next fiscal year and PIC does not expect our budget to be increased in the foreseeable future.

We share this information with you not to excuse our reluctance to pursue legislative changes to the Dual Employment law but to make you aware that while we completely agree with your recommendations, our ability to implement them is influenced by factors outside our control. PIC would like to thank you and your office for your diligent efforts to collect the necessary information to complete your report. Unfortunately, despite our willingness to assist you in that endeavor, we do not currently have the necessary data, nor do we have the means to meet your request for a statutory change which would allow us to provide you with the information.

Please contact us if you have any questions.

Respectfully,

/s/ Deborah J. Moreau, Esq.

Deborah J. Moreau, Esq.
Commission Counsel



STATE OF DELAWARE
DELAWARE STATE PUBLIC INTEGRITY COMMISSION

MARGARET O'NEILL BUILDING
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TELEPHONE: (302) 739-2399
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May 17, 2016

16-09 Post Employment--WAIVER GRANTED

Hearing and Decision By: Mark Dunkle, Esq., Vice Chair (Acting Chair); William F. Tobin, Jr., Chair;
Commissioners: Dr. Wilma Mishoe, Bonnie Smith

Dear Dr. McClure,

Thank you for attending the Commission meeting on May 17, 2016, where you were accompanied by Dr. Robert Sundquist. After careful consideration of all the relevant facts and circumstance, the Commission decided to grant a waiver of the post-employment restriction in the Code of Conduct to allow Dr. Sundquist to contract with the Division of Public Health (DPH) for a period of one year.

I. FACTS

You are the Dental Director for the Division of Public Health (DPH) within the Department of Health and Social Services (DHSS). DPH provides dental services for children receiving Medicaid as well as other needy children who would not otherwise have the resources for dental care. You estimated that DPH provides dental services to 1500 students from 50 different schools over the course of a year. In your written submission, as well as your comments at the hearing, you advised the Commission that Delaware's dental licensing standards are among the strictest in the country. As a consequence, it is difficult for DPH to recruit dentists from an already small pool of potential applicants.

One of DPH's dentists, Dr. Sundquist, retired from State service on April 1, 2016. You intend to hire a replacement but anticipate the hiring process will be fairly lengthy given Delaware's strict licensing requirements. In the meantime, Dr. Sundquist has agreed to a part-time employment contract with DPH to provide services for approximately 75 days per year. However, Dr. Sundquist is prohibited by the post-employment restriction in the Code of Conduct from contracting with his former agency for a period of two years. You stated DPH would suffer a hardship if not allowed to contract with Dr. Sundquist because DPH would be unable to meet the needs of children seeking dental care in the State and community clinics. To alleviate the hardship you asked the Commission to consider a waiver of the post-employment restriction to allow Dr. Sundquist to contract with DPH prior to the expiration of the two year post-employment restriction.

II. APPLICATION OF THE FACTS TO THE LAW

A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official’s responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if Dr. Sundquist would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To ascertain if there is a substantial overlap, the Commission compares the duties and responsibilities during employment to the post-employment activities. In this case you acknowledge, and the Commission concurs, that Dr. Sundquist’s part-time employment as a private contractor with DPH would, in fact, violate the post-employment restriction in the Code of Conduct.

The Commission next considered whether DPH qualified for a waiver of the post-employment restriction.

B. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).

(1) "Undue hardship," means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary*, p. 1290 (10th ed. 1992).

Delaware’s strict licensing standards will likely have an adverse effect on the number of applicants responding to DPH’s job posting. In addition, Delaware does not offer licensing reciprocity with any other State. Under a reciprocity agreement, participating states allow professionals licensed in

one state to practice in another participating state. Both of these factors are likely to complicate the search for Dr. Sundquist's replacement. As discussed at the meeting, DPH already has an opening for a full-time dentist at the Seaford location and that posting is scheduled to accept applications for four months. It is highly unlikely that DPH can expect to replace Dr. Sundquist in a more concise time frame. In the meantime the Milford clinic, where Dr. Sundquist worked prior to his retirement from State service, is expected to treat approximately 250 needy children from 10 different schools.

Given the length of time needed to find a replacement for Dr. Sundquist, as well as the issues discussed below, the Commission agrees that DPH would suffer an 'undue hardship' if not allowed to contract with Dr. Sundquist. The length of the waiver is one year.

(2) Is literal application of the law necessary to serve the public purpose?

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. "*Ethics in Government Act, Senate Report No. 95-1770, p. 32.* In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

Today public confidence in government has been weakened by a widespread conviction that officials use public office for personal gain, particularly after they leave government services. There is a sense that a "revolving door" exists between industry and government; that officials 'go easy' while in office in order to reap personal gain afterward.... There is a deep public uneasiness with officials who switch sides—.... Private clients know well that they are hiring persons with special skill and knowledge of particular departments and agencies. That is also the major reason for public concern. *Id.*

The Commission also considered the fact that Dr. Sundquist would be contracting with his former agency. Delaware Courts have specifically noted that where government officials seek contracts with their governmental entity, that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748, 752 (1971). The Code of Conduct was subsequently enacted with restrictions, such as the post-employment law, which aids in avoiding those very types of allegations and suspicions.

It was apparent to the Commission that there will likely be a long period of time between Dr. Sundquist's retirement and recruiting a suitable candidate to fill his position. In the meantime, the public has an interest in making sure that needy children have access to dental care. The Commission also recognizes that dentists not only provide dental care but also refer children to physicians in appropriate cases. As a result, the loss of dental care, as well as potential identification of other medical issues requiring the services of a physician, would adversely affect the children in the community. Next, the Commission considered the relatively short duration of the proposed contract between DPH and Dr. Sundquist, one year. Lastly, the Commission noted that waivers granted by the Commission are a matter of public record. That ensures that the public knows why Dr. Sundquist was allowed to contract with the State in contravention of the Code.

After considering all the relevant factors, the Commission decided that a waiver of the post-employment restriction in this matter would better serve the public purpose than enforcement of the post-employment restriction.

III. CONCLUSION

The Commission granted a waiver of the post-employment restriction to allow DPH to contract with Dr. Sundquist to provide part-time dental services for a period of one year. If, at the end of one year, DPH has not been able to recruit a full-time dentist, you should seek further advice from the Commission. A complete copy of this opinion will be published so the public is aware of the waiver.

Sincerely,

/s/ Mark Dunkle, Esq. /s/

Mark Dunkle, Esq.
Acting Chair



STATE OF DELAWARE
DELAWARE STATE PUBLIC INTEGRITY COMMISSION

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October 26, 2016

16-52--Post Employment--WAIVER REQUEST (GRANTED)

Hearing and Decision By: William F. Tobin, Jr., (Chair); Bonnie Smith (Vice Chair);
Commissioners: Commissioner Mishoe, Jeremy Anderson, Esq., Michele Whetzel

Dear Ms. White,

Thank you for attending the Commission meeting on October 18, 2016 where you were accompanied by Fred Gatto, your supervisor. After consideration of all the relevant facts and circumstances, the Commission decided to GRANT your agency's request for a one-year waiver of the Code of Conduct's post-employment restriction to allow you to contract with a former employee. The Commission's reasoning is set forth below.

I. FACTS

You are the Director of the Women, Infants and Children ("WIC") program within the Division of Prevention and Behavioral Health Services ("PBHS"), Department of Services for Children, Youth and their Families ("DSCYF"). WIC is a program designed to help low-income pregnant, postpartum, and breastfeeding women, infants, and children under the age of 5 who are at nutritional risk. WIC provides vouchers to qualified individuals so they can obtain nutritious foods to supplement their diet, provides information about healthy eating options including breastfeeding, and makes referrals to health care.¹

In order to qualify for a federal grant, the WIC program must have a Nutrition Coordinator. Laura Peppelman, Delaware's Nutrition Coordinator, retired on September 30th after 17 years of service. Two months prior to Ms. Peppelman's retirement, you posted the anticipated job vacancy on the State's website. To qualify for the position, candidates must be a Registered Dietician with three years of experience. In Delaware, there are 299 registered dieticians whose median annual salary is between \$47,000 and \$56,000. The posting resulted in only two qualified applicants. One applicant withdrew her application after learning of the offered salary, \$44,000 per year. The other applicant was interviewed and offered the position but she declined when she too learned of the salary.

¹ www.womeninfantschildrenoffice.com

In addition to administering the Nutrition Assistance Program, the employee serves as a preceptor to Dietetic Interns at the University of Delaware and also serves on the University's Intern Selection Committee. Your Division often recruits employees from the University's intern program.

You were concerned that the continued job vacancy would affect WIC's ability to meet their obligations to the University and the current class of Dietetic Interns as well as maintaining WIC's eligibility for the federal grant. You asked the Commission for a waiver of the two year post-employment restriction to allow PBHS to contract with Ms. Peppelman until you can fill her position.

II. APPLICATION OF THE FACTS TO THE LAW

A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if Ms. Peppelman would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To ascertain if there is a substantial overlap, the Commission ordinarily compares the duties and responsibilities during employment to the post-employment activities. However, in this case, you acknowledge that your request to contract with Ms. Peppelman to perform her former job duties is a violation of the two year post-employment restriction in the Code of Conduct. Instead, you asked the Commission, on behalf of PBHS, to consider a waiver based upon agency hardship.

B. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).

(1) "Undue hardship," means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992)).*

You posted the impending vacancy well in advance of Ms. Peppelman's retirement. Even so, the posting only attracted two qualified applicants. Both of those applicants withdrew their application because of the low salary. In response, you requested approval to hire an applicant above the \$44,000 minimum salary which was denied. The position is still posted on the State website and you have not received any new applications. At the meeting, the Commission suggested posting the vacancy on a national website in the hopes of attracting a larger pool of applicants. In the meantime, WIC is out of compliance with the federal grant requirements, unable to meet its obligations to the University and to the public (which is discussed below).

One factor the Commission evaluates when deciding to grant a waiver is whether the employee would be making more money as a contract employee than they were earning as a full-time State employee. Consideration of that factor is important when determining whether an employee, or ex-employee, has left State employment for the purpose creating a vacancy which would allow them to return as a contract employee at a higher salary. When asked about Ms. Peppelman's proposed compensation as a contract employee, you stated Ms. Peppelman would be earning less money than what she was earning when she left State employment.

Based on your difficulty recruiting qualified applicants, WIC's need to comply with the criteria of the federal grant, WIC's obligations to the University and the fact that the vacancy was not created to reap a financial benefit, the Commission decided to grant your agency's request for a hardship waiver of the post-employment restriction for a period of one year. In the meantime, you should consider posting the vacancy on other websites to attract a greater pool of applicants

(2) Is literal application of the law necessary to serve the public purpose?

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. *"Ethics in Government Act," Senate Report No. 95-1770, p. 32.* In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

Today public confidence in government has been weakened by a widespread conviction that officials use public office for personal gain, particularly after they leave government services. There is a sense that a "revolving door" exists between industry and government; that officials 'go easy' while in office in order to reap personal gain afterward.... There is a deep public uneasiness with officials who switch sides—.... Private clients know well that they are hiring persons with special skill and knowledge of particular departments and agencies. That is also the major reason for public concern. *Id.*

On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 Del. C. § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State. It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise directly and materially responsible for

while employed by the State. 29 Del. C. § 5805(d) . *Commission Op. 01-07.*

Here, it appears there are limited resources from which you can recruit to fill the vacancy. In the meantime, the public certainly has an interest in making sure that low-income individuals have access to resources which provide them with proper nutrition. Additionally, when the Commission grants a waiver, the decision becomes a matter of public record. That ensures that the public knows why a former State employee was allowed to contract with the State in contravention of the Code.

III. CONCLUSION

The Commission decided to GRANT your agency's request for a hardship waiver for a period of one year. If the position remains vacant at the end of that year, you should return to the Commission for further advice.

Sincerely,

/s/ William F. Tobin, Jr. /s/

William F. Tobin, Jr.
Chair